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Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-662

JAMES R. SCHLESINGER, *et al.*,

Petitioners,

—v.—

BRUCE R. COUNCILMAN,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE AMERICAN CIVIL LIBERTIES UNION AND THE NATIONAL ORGANIZATION FOR THE REFORM OF MARIJUANA LAWS, *AMICI CURIAE*

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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. 73-662

JAMES R. SCHLESINGER,
ET AL.,

Petitioners,

v.

BRUCE R. COUNCILMAN,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF FOR THE AMERICAN CIVIL LIBERTIES UNION AND THE NATIONAL ORGANIZATION FOR THE REFORM OF MARIJUANA LAWS, AMICI CURIAE

This brief is submitted with the consent of all parties. Copies of the letters granting consent have been filed, in accordance with Rule 42(2), with the Clerk of the Court.

Interest of Amici Curiae

The National Organization for the Reform of Marijuana Laws (NORML) is a non-profit organization composed of more than ten thousand members, including many persons presently serving in the United States Armed Forces. NORML takes the public position that the personal possession and use of marijuana should be a matter of individual choice, and should not be subjected to criminal penalties.

NORML is involved in a number of law suits seeking reform of existing marijuana laws. The organization is a plaintiff in a civil action filed in the United States District Court for the District of Columbia seeking a declaratory judgment that the private possession and use of marijuana is constitutionally protected by the right of privacy. NORML v. Wilson (Civil Action No. 1897-73). It is also a petitioner in a proceeding before the Justice Department's Drug Enforcement Administration to reschedule marijuana in the Federal Controlled Substances Act. In the Matter of the National Organization for the Reform of Marijuana Laws, D.E.A. Docket No. 74-7.

The American Civil Liberties Union (ACLU), organized in 1920, is a national non-partisan association dedicated to the preservation and protection of individual civil liberties. Both the ACLU and its local affiliates have participated as amici curiae in numerous cases before this Court

involving civil rights and personal liberties and the ACLU has had a long-standing concern that constitutional protections be afforded to the nation's military personnel. Attorneys for the ACLU have recently filed a petition for a writ of certiorari to the District of Columbia Circuit in a case involving similar issues to those presented here. Mascavage v. Schlesinger, No. 73-1795, filed May 30, 1974. ACLU counsel have in addition represented service personnel in hundreds of cases in the military and the civilian courts, and submit this brief for the purpose of arguing that the great protections established by O'Callahan and Relford should not be dissipated.

Questions Presented

1. Whether possession by a serviceman of a small amount of marijuana in his private civilian off-post apartment is a service connected offense under O'Callahan v. Parker, 395 U.S. 258 (1969), and its progeny.

2. Whether sale and transfer of small amounts of marijuana by an off-duty, off-post serviceman to an undercover agent, who worked for both military and civilian authorities, are service-connected offenses.

3. Whether a federal district court must dismiss a request for injunctive relief directed to an impending court-martial proceeding on the ground that the service person has not exhausted all in-service criminal remedies.

Statement of the Case

Bruce R. Councilman, Respondent, is a Captain on active duty in the United States Army, stationed at Fort Sill, Oklahoma. Councilman has been charged by an Army court-martial with violation of Article 134 of the Uniform Code of Military Justice. 1/ The specifications allege (1) a transfer of two marijuana cigarettes to Glenn D. Skaggs on March 15, 1972; (2) a sale of approximately one-fifth of an ounce of marijuana to Glenn D. Skaggs later that same day; and (3) possession of less than one and one-half ounces of marijuana in his off-base apartment when it was searched on March 18, 1972.

The basis for these charges is set out in the Tenth Circuit's decision below:

> The facts, which are not in dispute, are as follows: The Army authorities were advised by a confidential informant that Councilman was using marijuana in his off-post apartment. Thereafter, at a party to which he was invited for that purpose, Captain Councilman was introduced to an undercover agent of the Army's Criminal Investigation Division, Specialist Four Glen D. Skaggs

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1/ Article 134, one of the so-called General Articles, prohibits "all disorders and neglects to the prejudice of good order and discipline in the armed forces." 10 U.S.C. §934.

> Skaggs was using the name Danny Drees, and was introduced to Councilman as an Army clerk-typist, also stationed at Fort Sill. Thereafter, it is alleged that Councilman on one occasion transferred, and on another sold, small amounts of marijuana to Skaggs, alias Drees.
>
> Based on Skaggs' investigation, Councilman was apprehended by civilian authorities, and a search of his apartment turned up a small quantity of marijuana. Skaggs from time to time also acted on behalf of the civilian authorities. Councilman was subsequently turned over to military authorities, and the court-martial proceedings here in issue were commenced. During all times relevant to the issues in this case, it is stipulated that Councilman was off-post, off-duty, and out of uniform, and that Skaggs was off-post and out of uniform, and although ostensibly off-duty, was in fact on duty in his capacity as an undercover agent.

On March 27, 1972 court-martial charges were brought against Councilman on the above-cited offenses of possession, transfer (by gift) and sale of marijuana. At a preliminary hearing, Councilman moved the presiding military judge to dismiss the charges on the ground that the offenses were not "service connected" under O'Callahan v. Parker, 395 U.S. 258 (1969). After holding an evidentiary hearing, the military judge

denied the request.

On July 5, 1972, Councilman brought an action in the United States District Court for the Western District of Oklahoma to enjoin his impending court-martial. The District Court found, after hearing, that the offenses were not service connected and on that basis enjoined the court-martial proceeding for lack of jurisdiction. The court's opinion and decision on request for rehearing were not reported and are found in Petitioners' Appendix. On appeal, the Court of Appeals for the Tenth Circuit uanimously affirmed the District Court. 481 F. 2d 613 (9th Cir. 1973). Certiorari was granted by this court on December 17, 1973.

Summary of Argument

A. Possession of small amounts of marijuana by a serviceman in his private civilian off-post apartment is not a service connected offense over which the military has court-martial jurisdiction. The great majority of the federal courts which have ruled upon the service-connection of marijuana possession in the civilian community have held it not to be service-connected. The reasoning of these cases should be followed by this Court, as it is fully consistent with the criteria set forth in O'Callahan v. Parker and Relford v. Commandant, 401 U.S. 355 (1971).

Furthermore, Petitioners' argument for service-connection relies almost exclusively

on the purported "severely detrimental" effect of marijuana possession on the military, assertions of harm unsupported by any evidence of record. Military jurisdiction should not be predicated on such a slender thread.

B. Neither a gratuitous transfer nor a sale of small amounts of marijuana by an off-duty, off-post serviceman to an undercover agent who functions for both military and civilian authorities is a service-connected offense. Such offenses have no impact upon any uniformed person other than the transferor and clearly do not directly affect the health, morale or fitness of any other member of the armed services. Here too the reasoning of O'Callahan and Relford are instructive.

C. The federal courts are not constrained by precedent or policy considerations from enjoining an impending court-martial on the ground that the military tribunal lacks jurisdiction to try the offense. This is so whether or not the accused service person has taken any preliminary action in the military to dismiss the case, for the exhaustion doctrine is properly applicable only where the federal court is deferring to another fact-finder's special expertise; on the issues here presented, the military courts have no special expertise. Applied to the present case, moreover, the argument against requiring further exhaustion is even more compelling. The Respondent unsuccessfully moved to dis-

miss the charges at a preliminary-type hearing convened by the military under Article 39(a), 10 U.S.C. §839(a), and any further resort to the military would be an exercise in futility in light of the decision of the Court of Military Appeals in United States v. Sexton, 23 USCMA 101, 48 CMR 662 (1974). There, the highest military tribunal expressly refused to follow the holdings of the trial and appellate courts in this very case, and held instead that off-post sales and transfers of marijuana to an undercover agent were service-connected offenses.

ARGUMENT

I.

POSSESSION BY A SERVICE MEMBER OF A SMALL AMOUNT OF MARIJUANA IN HIS PRIVATE CIVILIAN OFF-POST APARTMENT IS NOT A SERVICE-CONNECTED OFFENSE.

One of the offenses charged in the specifications against respondent is the possession of a small amount of marijuana (less than 1-1/2 ounces) in his apartment in the civilian community of Lawton, Oklahoma. This simply is not the type of offense for which military jurisdiction is permitted under O'Callahan v. Parker, 395 U.S. 258 (1969).

O'Callahan involved a Sergeant in the United States Army who had been charged and convicted by court-martial of a housebreaking, attempted rape, and assault with intent

to rape while he was properly absent from his military base. This Court held that the court-martial had lacked jurisdiction to try him for these offenses, and in so holding stressed several circumstances. It noted that O'Callahan was authorizedly absent from his military base when he committed the charged offenses, that there was no connection between his military duties and the crimes in question, that the crimes were not committed on a military post, that the person attacked was not performing any duties relating to the military, that the situs of the crime, Hawaii, was not an armed camp under military control, and that the offenses involved neither the flouting of military authority, the security of a post or the integrity of military property. Since the offense was committed within United States territorial limits, and the civilian courts were open, the Court could not find a basis for restricting access to these civilian courts. To the Court, offenses had to have a substantial "service connection" before the military courts could assume jurisdiction in place of the civilian tribunals before whom all other citizens were tried.

The historical underpinnings of O'Callahan are multiple and complex. Primarily, the Court expressed its concern with the absence in the court-martial context of procedural rights guaranteed as a matter of course to civilian defendants. 395 U.S. at 263-66. For this reason, as the

Court noted, "free countries of the world have tried to restrict military tribunals to the narrowest jurisdiction deemed absolutely essential to maintaining discipline among troops in active service." Id. at 265. In addition to the disparity in procedural rights, this Court was acting in the light of a history of expansion of military subject matter jurisdiction far beyond the confines of the specialized requirements of the battlefield or the isolated Nineteenth Century post. See generally Moyer, Justice and the Military, §1-400 et seq. (1972). In essence, what had occurred was that the military authorities had come to assume that military courts were alternative appropriate forums in almost every instance where a service person was charged with commission of a crime.

Two years after O'Callahan, this Court decided Relford v. Commandant, 401 U.S. 355 (1971). Justice Blackmun, writing for the Court, reaffirmed the premise of O'Callahan that court-martial jurisdiction must be limited to the "least possible power adequate to the end proposed." 401 U.S. at 363. He went on to list twelve numbered and nine lettered factors which were to serve as criteria for determining whether or not an offense is service-connected. 401 U.S. at 365. The twelve numbered factors were: (1) the serviceman's proper absence from the base; (2) the crime's commission away from the base;

(3) its commission at a place not under military control; (4) its commission within our territorial limits and not in an occupied zone of a foreign country; (5) its commission in peacetime and its being unrelated to authority stemming from the war power; (6) the absence of any connection between the defendant's military duties and the crime; (7) the victim's not being engaged in the performance of any duty relating to the military; (8) the presence and availability of a civilian court in which the case can be prosecuted; (9) the absence of any flouting of military authority; (10) the absence of any threat to a military post; (11) the absence of any violation of military property; and (12) the offense being one which is traditionally prosecuted in civilian courts.

Turning to the marijuana possession charge in the present case, there is found each of the factors which point away from service-connection. Among other things, the crime occurred off-base, no military duties were being performed, and the offense is prosecuted every day in the civilian courts. Petitioners seemingly ignore these factors, however, and rest their case on the baseless assertion that possession of marijuana has a "disastrous" effect upon the performance of military duties. However, there is no support in Petitioners' brief, and no evidence below, to justify such an assertion. The Court of Military Appeals itself has held that

even a court-martial cannot assume, as a matter of law, that possession or use of a narcotic drug is prejudicial to army discipline. United States v. Williams, 8 USCMA 325 (1957). As the Court there summarized its decision:

> At no time was the court-martial instructed that it must find, in order to convict, that the accused's conduct was prejudicial to good order and discipline in the armed forces, or was of a nature to bring discredit on the armed forces.
>
> Before the board of review the Government took the position that the prejudicial character and service-discrediting nature of the offense charged was not an element and hence there was no need for the law officer to so instruct. In this Court the Government slightly altered its position and contended that wrongful use of narcotics is "as a matter of law" conduct prejudicial to good order and discipline and, accordingly, the court-martial need not be instructed that it must so find in order to convict. We are unimpressed with both arguments.
>
> * * *
>
> We are not unmindful of the disastrous effects occasioned by the wrongful use of narcotics on the health, morale and fitness for duty of persons in the

> armed forces. However, we cannot ignore the Congressional intent manifested in the Code, supra, and the Manual for Courts-Martial, United States, 1951, that all elements of an offense be instructed upon by the law officer. Article 51(c), Uniform Code of Military Justice, 10 USC Sec. 851(c); paragraph 73, Manual, supra. United States v. Lucas, 1 USCMA 19, 1 CMR 19; United States v. Clay, 1 USCMA 74, 1 CMR 74. It is an element of the offense and must be instructed upon. The Government's contention that wrongful use of narcotics is prejudicial conduct as a matter of law would be equally applicable to practically every offense charged under the general Article. Accordingly, we hold that the law officer erred in failing to instruct the court that in order to find the accused guilty of the offense charged, it must find that under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces. 8 USMCA at 326-27 (emphasis supplied).

It is the position of amici that the evidence concerning marijuana belies any assertion that its possession and use off-post and off-duty would adversely affect a serviceman's performance of his duties. This was the finding of a United States Army military judge in Fort Bliss, Texas in

United States v. Watson, 6 Crim. L. Reptr. 2377, 3 SSLR 3985 (1970). The judge there observed:

> The overwhelming weight of modern medical and scientific opinion, as presented to this court in testimony by Army medical officers, and the numerous exhibits offered by both sides, is to the effect that the use of marijuana--let alone mere possession--does not intrinsically have a 'disastrous effect' on the 'health, morale, and fitness for duty of persons in the armed forces.'
>
> The 'service connection' delineated by dicta of the Court of Military Appeals in[United States v.]Beeker,[18 USCMA 563, 40 CMR 275 (1969)] concerning off-post possession of marijuana rests solely upon the Court's misconception that marijuana be equated in its effects with habit-forming narcotic drugs. Inasmuch as the dicta in Beeker depends to this extent upon an incorrect factual premise, it can hardly justify a finding of 'service-connection' in an off-post marijuana possession situation like that alleged in the instant case.

To the same effect, the Court of Appeals for the Fifth Circuit in Cole v. Laird, 468 F.2d 829 (5th Cir. 1972), held that off-post possession of marijuana was not service-connected, and stated:

> It is clear that marijuana does not rise to the level of heroin or other physically addictive "hard" drugs and the dangers associated with its use--whatever they may be--are not as great as those associated with heroin and the like. 468 F.2d at 833.

Amici could cite other evidence in support of the proposition that marijuana use does not adversely affect service personnel. 2/ But the basic point is simply that Petitioners have failed in their burden to prove the contrary conclusion.

The military authorities had two opportunities to present evidence in support of this claim--first at the hearing before the presiding military judge on the service-connection question, and later at the hearing before the District Court on the same issue. As far as amici can determine, not one iota of evidence was ever introduced to support the conclusions drawn in the Petitioners' briefs. Jurisdiction to remove a citizen from the protections afforded by a civilian trial court, be it federal or state, cannot, under the teachings of O'Callahan and Rel-

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2/ See, e.g., the affidavits of Doctors Ungerleider and Grinspoon in NORML v. Wilson, Civ. Act. No. 1897-73, now pending in the United States District Court for the District of Columbia.

ford, rest on an unsubstantiated conclusion that a service connection exists.

In Relford, as we noted above, Justice Blackmun also listed certain lettered interests which if present, would strongly point to service-connection, 401 U.S. at 367-69. Significantly, none are present here: "(a) the essential and obvious interest of the military in the security of persons and of property on the military enclave . . .; (b) the responsibility of the military commander for maintenance of order in his command and his authority to maintain that order . . .; (c) the impact and adverse effect that a crime committed against a person or property on a military base, thus violating the base's very security, has upon morale, discipline, reputation and integrity of the base itself, upon its personnel and upon the military operation and the military mission . . .; (d) the conviction that Article I, Sec. 8, Clause 14, vesting in the Congress the power 'To make Rules for the Government and Regulation of the land and naval Forces,' means, in appropriate areas beyond the purely military offense, more than the mere power to arrest a serviceman-offender and turn him over to the civil authorities. The term 'Regulation' itself implies, for those appropriate cases, the power to try and to punish . . .;(e) the distinct possibility that civil courts, particularly non federal courts, will have less than complete interest, concern, and

capacity for all the cases that vindicate the military's disciplinary problems within its own community . . .; (f) the very positive implication in O'Callahan itself, arising from its emphasis on the absence of service-connected elements there, that the presence of factors such as geographical and military relationships have important contrary significance; (g) the recognition in O'Callahan that, historically, a crime against the person of one associated with the post was subject even to the General Article . . .; (h) the mis-reading and undue restriction of O'Callahan if it were interpreted as confining the court-martial to the purely military offenses that have no counterpart in non-military criminal law; and (i) our inability appropriately and meaningfully to draw any line between a post's strictly military areas and its nonmilitary areas, or between a serviceman-defendant's on-duty and off-duty activities and hours on the post."

Applied to the present fact situation, it seems obvious that none of these interests are involved. Stripped to its essentials, the only "service-connection" in the case of off-post marijuana possession is the fact that the respondent is a service person.

The majority of federal trial and appellate courts which have decided the issue have reached the conclusion that off-post possession of marijuana is not service-

connected. See cases cited in Petitioners' Brief on the Merits, p. 14, n. 4, and Holder v. Richardson, 364 F. Supp. 1207 (D.D.C. 1973). The Court of Military Appeals has held, however, that the off-base possession and use of marijuana is service-connected because of the "disastrous effects" of marijuana "on the health, morale and fitness for duty of persons in the armed forces." United States v. Beeker, 18 USCMA 563, 565 40 CMR 275, 277 (1969). Petitioners repeatedly refer in their papers here to the "special competence" and "expertise" of the Court of Military Appeals in making this judgment. However, upon closer examination, it appears that the Court of Military Appeals did not consider any evidence or rely upon any sources in pronouncing the disastrous effects of marijuana in the Beeker case and its progeny. See also Moyer, Justice and the Military, supra, at 166. This was recognized by the Fifth Circuit in Cole v. Laird, supra, 468 F.2d at 832:

> Just what affirmative elements are necessary and sufficient to establish the requisite nexus between military and offense is not yet clear. The jurisdiction extends over the possession and use of marijuana or habit forming narcotics on the theory that the use of these items undermines the readiness of the fighting force. The theory was first expressed in dicta in United States v. Beeker, 1969, 18 U.S.C.M.A. 563, 40 C.M.R. 275. It was later accepted without analysis in United States v. Adams, 1969, 19 U.S.C.M.A. 325, 24 C.M.R. 75.

> The rationale which the Court of Military Appeals used to bolster this theory was enunciated in United States v. Williams, 1957, 8 U.S.C.M.A. 325, 24 C.M.R. 135. There, the Court of Military Appeals held that, notwithstanding its judicial notice of the 'possible disastrous effects . . . on the health, morale and fitness for duty of persons in the armed forces' of the use of habit forming narcotics, the panel members must be specifically charged to acquit unless they found that defendant's possession and use of drugs to be prejudicial to the good order and discipline of the service. Thus the Beeker Court's reliance on Williams was misplaced.

In sum, amici submit that neither the Petitioners here, the military in the proceedings below, or the military appellate tribunals considering the legal issue, have established that off-base possession of marijuana has a "disastrous effect on the health, morale, and fitness for duty of persons in the armed forces," or that it has any other effect on them whatever. Such an assumption without proof would in effect vitiate O'Callahan and abandon its interpretation to the military courts.

The petitioners assume without offering any evidence that marijuana use would cause "lower effectiveness" (Pet. Brief, p. 6). They further argue that if possession of

marijuana is not a service connected offense then effectiveness and equality of treatment would suffer when service people are stationed in "permissive states". This assertion is a non-sequitor for several reasons. There is now inequality between those service people stationed overseas and those stationed in the United States, for O'Callahan does not apply outside of the United States. United States v. Weinstein, 19 U.S. C.M.A. 29, 41 CMR 29 (1969). Many acts cognizable by courts martial if they occurred on base vary in their illegality from state to state, for example adultery and wrongful cohabitation under article 134, UCMJ, 10 U.S.C. 934.

II. SALE AND TRANSFER OF MARIJUANA BY A SERVICEMAN OFF-DUTY AND OFF-POST TO A MILITARY UNDERCOVER AGENT ARE NOT SERVICE-CONNECTED OFFENSES.

Respondent has been charged by court-martial with two transfers of marijuana to an undercover agent on the same day. The first transaction involved an alleged transfer by gift of two marijuana cigarettes. Later that same day, Respondent is alleged to have sold approximately one-fifth of an ounce of marijuana to the CID agent. As the Tenth Circuit pointed out:

> "During all times relevant to the issues in this case it is stipulated that Councilman was off-post, off-duty, and out of uniform, and although ostensibly off-duty, was in fact on duty in his

> capacity as an undercover agent." Petitioners' Appendix A, at 11.

The main distinction between these alleged offenses and the simple possession of marijuana is that these offenses involve another serviceman. The Solicitor General argues that:

> "The impact of such an unlawful transaction goes far beyond the particular enlisted man who purchases the drug. Councilman knew that his status as an officer was known to Skaggs, and it is apparent that, in the tightly-knit, rumor-prone society of the military, word will usually circulate among the enlisted ranks concerning an officers' participation in such unlawfulness." Brief on the Merits, at 5 (emphasis supplied).

While amici question whether the military would accept this characterization of its "rumor-prone society," we cannot in any event see that this factor is involved where, as here, the enlisted man was an undercover military agent.

An important and obvious question is whether Skaggs could be considered a "victim" within the meaning of the seventh listed criterion in Relford. We think Relford and other decisions in its wake make clear that Skaggs cannot be regarded as such a victim. Relford involved the

rape of two women. The court there stated:

> The second victim, because of her duties at the post exchange, and because of the fact that her abduction and the attack upon her took place as she was returning to the PX at the end of a short and approved break in her work, was engaged in the performance of a duty relating to the military. 401 U.S. at 366.

No such finding was made regarding the first victim, though she was a sister of a serviceman at the base. Thus, it apparently is not enough that a victim be a member (or employee) of the military establishment in order to satisfy this criterion; instead, the person must also be engaged in a duty related to the military at the time of the crime. As Judge Green put it in Holder v. Richardson, 364 F. Supp. 1207 (1973), which also involved an off-base transaction in marijuana between members of the military service:

> "The sale of marijuana involves a victim. Hence the seventh element in the 12 elements outlined in Relford comes into play. The test is whether the victim was being engaged in the performance of a duty relating to the military at the time of the offense. In Relford, one victim was so engaged. She was returning to her job at the PX after an approved break. Although

> the victim in the case at bar was a member of the military service, it does not appear that she was engaged in a military service, it does not appear that she was engaged in a military duty at the time of the offense." 364 F. Supp. at 1211.

Judge Green concluded that the military authorities did not have jurisdiction over off-post, off-duty sales between servicemen.

Skaggs, alias Drees, the "victim" in the present proceedings, admittedly was a military member. Since he was an undercover agent assigned to buy the marijuana from Councilman, he could, arguendo, be considered to be engaged in a military duty. But see Schroth v. Warner, 353 F. Supp. 1032, 1044 (1973), which held that a military undercover agent "is not performing a function which has any special military significance." But even if this is a proper conclusion, for the Court to then hold that Skaggs was a military victim within the seventh criterion would be to permit the military to manufacture jurisdiction where none otherwise exists. Sale of marihuana to Skaggs could not conceivably have any effect on the health, morale, or fitness of any member of the armed services, and jurisdiction should not, per se, lie in the military courts. However, even if the "victim" was an ordinary serviceman, something more than mere status should be required by this Court to prove a service connection.

In United States v. Sexton, 23 USCMA 101, 48 CMR 662 (1974), the Court of Military Appeals refused to accept the holding of the court below in this case and concluded on similar facts that military jurisdiction was present. Although the court cited O'Callahan, it clearly did not follow this Court's mandate and relied upon no new findings or evidence or military expertise. Amici urge that the military authorities should not be allowed to "manufacture" jurisdiction for themselves by having intelligence agents pose as servicemen and make arrests for an off-base offense, which if it involved a civilian would clearly be outside military jurisdiction. This backdoor approach to avoiding the import of the Supreme Court's decisions in O'Callahan and Relford, we submit, not only fails to recognize the constitutional import of those decisions, but also constitutes a direct assault upon the protections which this Court there sought to grant to service persons.

III.

THE DISTRICT COURT PROPERLY REFUSED TO DISMISS RESPONDENT'S ACTION FOR FAILURE TO EXHAUST IN-SERVICE CRIMINAL PROCEDURES.

In their brief on the jurisdictional issues, petitioners urge that respondent should have been required to exhaust his

military judicial remedies before seeking a federal court determination that the military courts lacked jurisdiction to try him for the charged offenses. For several reasons this argument is totally erroneous.

At the outset, we think it clear that the exhaustion doctrine, which is designed basically to ensure that a court defer consideration of issues which might in the first instance be better resolved by a knowledgeable administrative tribunal, simply has no place in the present context. A court-martial has no special expertise in reviewing its own jurisdiction, nor can it be expected to be an impartial, much less knowledgeable, analyst of the question. In Noyd v. Bond, 395 U.S. 683 (1969), this Court recognized the illogic of applying the exhaustion doctrine to jurisdictional challenges, and made clear that this result was no oversight; observing that neither exhaustion nor judicial abstention had been required in McElroy v. Guagliardo, 361 U.S. 281 (1960); Reid v. Covert, 354 U.S. 1 (1960); and Toth v. Quarles, 350 U.S. 11 (1955), the Court went on:

> "The cited cases held that the Constitution barred the assertion of court-martial jurisdiction over various classes of civilians connected with the military, and it is true that this Court there vindicated complainant's claims without requiring exhaustion of military remedies. We did so, however, be-

> cause we did not believe that the expertise of military courts extended to the consideration of constitutional claims of the type presented. Moreover, it appeared especially unfair to require exhaustion of military remedies when the complainants raised substantial arguments denying the right of the military to try them at all. 395 U.S. 696, n. 6 (emphasis added).

Thus, in at least four instances, this Court has recognized that there is no question of exhaustion of remedies where an accused challenges the jurisdiction of a court-martial proceeding. See also Lee v. Madigan, 358 U.S. 288 (1959), aff'g. 148 F. Supp. 23 (1957).

The petitioners seek to distinguish McElroy, Reid and Toth on the ground that each involved the power to try civilians by court-martial, while Councilman is a serviceman. But the logic of those cases, as expressed in Noyd, is plainly applicable here; it is "especially unfair to require exhaustion of military remedies" where Councilman has "raised substantial arguments denying the right of the military to try [him] at all." Likewise, the relative expertise of civilian and military courts in determining the impact on military administration and discipline can be little different in the present case than in the case of a military dependant accused of killing her serviceman husband (Reid), or

in that of a former serviceman accused of committing crimes overseas before his discharge (Toth).

Amici would observe that there are no policy considerations for not bypassing the military courts when the issues are jurisdictional in nature. This Court in the Noyd excerpt cited above recognized the lack of any special expertise in the military judicial structure on such issues. While it is true that "special preference" is afforded by the federal courts to certain military court decisions, see Gusik v. Schilder, 340 U.S. 128 (1950), this deference stems not from any inherent sovereignty in the military, but from a concern for the effect of judicial intervention on military discipline, and from a desire to avoid involvement with technical provisions of the Uniform Code of Military Justice, Noyd v. Bond, supra, 395 U.S. at 696. O'Callahan type claims, by definition, are not within the proper scope of military concerns; they stem from the Constitution and from federal case law rather than the military's own principles of jurisprudence. And surely a federal district court is fully capable of making a factual determination on the twelve Relford factors as they relate to any individual set of circumstances.

The petitioners make much of the purported "interference with the jurisdiction of other judicial systems" which would assertedly result if the decisions of the

court below were affirmed, but in fact, there would be no such interference, because there is no jurisdiction in the military to try Councilman at all. Thus, there is no substance to the petitioners' claim that the district court lacked jurisdiction to "review" a determination by a court-martial, when it is not "review" which the respondent sought, but an order which would prevent the court-martial process from beginning at all, because it lacked any jurisdiction over him at all. The military, however, has sought to subject Councilman to what this Court recognized in O'Callahan, 395 U.S. at 266, is the irreparable injury of trial by court-martial itself, in a system without provision for bail pending trial and appeals, and without numerous other protections routinely available in a civilian trial. See Moyer, JUSTICE AND THE MILITARY, at 407-408 (1972). This assertion of court-martial jurisdiction is based not on the vaunted "expertise" and careful fact-finding of the military justice system, of which the petitioners make so much; it is based rather on a casual, offhand elevation by the Court of Military Appeals of unfounded fable into "facts" worthy of judicial notice. United States v. Beeker, 18 USCMA 563, 40 CMR 275 (1969). Nor, significantly, do petitioners anywhere in their brief give to this Court even an inkling of the type of additional facts which, they repeatedly suggest, were not sufficiently developed either in the Article 32 hearing, or in the district court.

There is another independent reason for not requiring the application of the exhaustion doctrine to the case at bar. Exhaustion has never been required where the criminal defendant would simply be engaging in an exercise in futility. The military courts have established an iron clad rule that use of drugs by a service person and the delivery of drugs by one service person to another is always service-connected. United States v. Rose, 19 USCMA 3, 41 CMR 28 (1969); United States v. Beeker, 18 USC MA 563, 40 CMR 275 (1969); United States v. Teasley, 22 USCMA 131, 46 CMR 111 (1973). It would be less than realistic to expect the military appellate tribunals to embark upon an ad hoc or case by case approach to this problem as dictated by Relford v. Commandant, supra. And in United States v. Sexton, 23 USCMA 101, 48 CMR 662 (1974) the Court of Military Appeals expressly rejected the logic and holding of the court below and held that the off-post sales and transfers of marijuana to an undercover agent were service-connected offenses. Thus, there is no question but that respondent is precluded from any chance of success in presenting his jurisdictional arguments before a military court. 3/

3/ In the event that a military person in respondent's position should be required to exhaust military remedies, we would urge that respondent has in fact exhausted his

Petitioners' "concession" that any effort by Councilman to resort to other military judicial remedies, such as appeal or extraordinary relief in the Court of Military Appeals, "would probably have been unsuccessful" is plainly far short of the mark; the latter court's decisions make abundantly clear that any such effort by an accused would be a hopeless and ineffective act.

> ". . . [T]he highest court available under the Uniform Code of Military Justice has consistently upheld jurisdiction over persons in the same legal posture as appellant. Appellant should not be required to await a similar decision in his case." Guagliardo v. McElroy, 259 F.2d 927, at 929, fn. 4 (D.C.Cir. 1958), aff'd 361 U.S. 281 (1960).

While the judge-made doctrine of exhaustion may be appropriate, where other remedies indeed hold out hope of relief,

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only available remedy by raising the issue in the course of an Article 39(a) hearing. The Court of Military Appeals has repeatedly refused to authorize extraordinary writs to examine jurisdiction in the case of off-post narcotics offenses. See Grip v. Commanding Officer, 22 USCMA 668 (1973); Rainville v. Lee, 22 USCMA 464 (1973); Mascavage v. Lee, Misc. No. 72-23 (C.O.M.A. May 16, 1973).

the courts have consistently recognized that "when there is nothing to be gained from the exhaustion of administrative remedies and the harm from the continued existence of the administrative ruling is great, the courts have not been reluctant to disregard this doctrine. See McCulloch v. Sociedad Nacional, 372 U.S. 10 (1963); Leedom v. Kyne, 358 U.S. 185 (1958); Lichter v. United States, 334 U.S. 742 (1948); Glover v. United States, 286 F.2d 84 (8th Cir. 1961); Bullard Co. v. N.L.R.B., 253 F. Supp. 391 (D.D.C. 1966)." Wolff v. Selective Service Local Board No. 16, 372 F.2d 817, 825 (2d Cir. 1967)(Medina, J.). See also, e.g., McKart v. United States, 395 U.S. 185 (1969) United States v. Fargnoli, 458 F.2d 1237 (1st Cir. 1972); Hammond v. Lenfest, 398 F.2d 705 (2d Cir. 1968). 4/

4/ This Court reached a similar result in Parisi v. Davidson, 405 U.S. 34 (1972), where petitioner had sought habeas corpus review of the military's denial of his application for discharge as a conscientious objector. The government insisted that Parisi should be required to exhaust his military remedies,by asserting the wrongful denial of his conscientious objector claim as a defense to his pending court-martial for disobedience of orders, and by applying to the Court of Military Appeals for a writ of habeas corpus to obtain his discharge. This Court held, however, that earlier de-

The courts which have rules contrary to Respondent's position have rested their decisions in part on the assertion --or the expectation-- that a military defendant might have presented to the military courts all of the facts in support of his or her claim that the alleged offense was not service-connected, and therefore not subject to court-martial jurisdiction. See, e.g., Sedivy v. Richardson, 485 F.2d 1115, 1121 (3rd Cir. 1973). However, where the Court of Military Appeals has repeatedly held that any possession of drugs is a service-connected offense it is plainly questionable whether an accused would have an opportunity to present evidence on the location and other circumstances of the offense -- evidence which the military courts would consider totally irrelevant. By the time the military justice system had run its course, Respondent was able to commence a post-conviction, post-military appellate exhaustion habeas corpus proceeding, the relevant evidence might well be lost or otherwise unobtainable.

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cisions of the Court of Military Appeals had rendered it at best dubious whether the court-martial defense would be recognized, while the Court of Military Appeals' statutory jurisdiction to grant the suggested habeas corpus relief was equally questionable; therefore, the Parisi Court held, the petitioner could not "properly be required to exhaust a remedy which may not exist." 405 U.S. at 45.

CONCLUSION

For the reasons set forth herein, amici urge this Court to affirm the holding of the Tenth Circuit that the offenses charged against Respondent were not service-connected and that, therefore, the military lacked jurisdiction to try the offense. In the alternative, amici believe this case should be remanded to the District Court for an evidentiary hearing on the service-connection issue, at which time the military authorities may attempt again to support the premise that marijuana has such a "severely detrimental" effect upon the military, that any off-base possession and/or transfer of the substance by a service person should be considered to be service connected within the meaning of the prior decisions of this Court.

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